Subject Index

	Page
Questions presented	1
Statement	2
Argument	3
1. What petitioner seeks is a re-evaluation of facts, which is not this court's function	3
2. No question of federal law is presented which has not been settled by this court	5
3. No conflict with this court or another Court of Appeals is presented	7
Conclusion	10

Table of Authorities Cited

Cases	Pages
Ballwanz v. Isthmian Lines, Inc., 319 F.2d 457, 1964 A.M.C. 1480 (4th Cir. 1963)	7, 8
Baltimore Steamship Company v. Phillips, 274 U.S. 316, 1927 A.M.C. 946 (1927)	6
Cox v. Esso Shipping Company, 247 F.2d 629, 1957 A.M.C. 1927 (5th Cir. 1957)	7, 8
Green v. American Tobacco Co., 325 F.2d 673 (5th Cir. 1963)	7, 10
Mahnich v. Southern Steamship Co., 321 U.S. 96, 1944 A.M.C. 1 (1944)	5
McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 1958 A.M.C. 1754 (1958)	6
Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 1960 A.M.C. 2251 (1960)	7, 8
Pacific Tow Boat Co. v. States Marine Corp., 276 F.2d 745, 1960 A.M.C. 696 (9th Cir. 1960)	4

Pages

Palermo v. Luckenbach Steamship Company, Inc., 355 U.S. 20, 1957 A.M.C. 2275 (1957) 6

Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 1954 A.M.C. 1 (1953) 6

Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3rd Cir. 1965) 7, 10

Sizemore v. United States Lines Co., 323 F.2d 774, 1964 A.M.C. 1950 (3rd Cir. 1963) 7, 9

Smith v. United States, 336 F.2d 165, 1965 A.M.C. 153 (4th Cir. 1964) 7, 9

Socony-Vacuum Oil Company v. Smith, 305 U.S. 424, 1939 A.M.C. 1 (1939) 5, 6

United New York and New Jersey Sandy Hook Pilots Association v. Halecki, 358 U.S. 613, 1959 A.M.C. 588 (1959) 6

United States v. Oregon State Medical Society, 343 U.S. 326 (1952) 2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 532

E. B. WELCH,
Petitioner,

vs.

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

The only questions actually presented by this record are:

1. Whether it was error for the Court of Appeals to have lacked a definite and firm conviction that the District Court was wrong in finding contributory negligence

and for the Court of Appeals to refuse accordingly to set aside the finding as clearly erroneous.[1]

2. Whether the well-settled rule that the doctrine of comparative negligence applies to maritime injury claims, when they are founded upon unseaworthiness as well as when they are founded upon negligence, should be overturned.

STATEMENT

Petitioner, an experienced officer holding a Chief Engineer's License (R. II, 65) and serving on this occasion as Third Assistant Engineer on the SS PRESIDENT ROOSEVELT, was instructed by the First Assistant Engineer to dismantle a pump which was not functioning properly and make such repairs as were necessary (R. II, 65). Petitioner testified that what he was told was: "Take the pump apart, disassemble it and find out what is wrong and fix it." (R. II, 56). It was not considered at the time that the crosshead would have to be carried anywhere (R. II, 92).

In the course of making the repairs it proved necessary to carry certain parts to the machine shop (R. II, 64). The District Court found that Petitioner injured his back as a result of carrying the 42-pound crosshead from the pump to the machine shop and held the vessel liable for unseaworthiness (Findings 7 and 8, R. II, 67).

Evidence showed that, at the time of the accident, there were several other men working in the engine rooms, in-

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[1]Findings are to be set aside as clearly erroneous only when the Court of Appeals has the "definite and firm conviction that a mistake has been committed". *United States v. Oregon State Medical Society*, 343 U.S. 326, 339 (1952).

cluding the First Assistant Engineer himself (R. II, 68; Exhibit: Pak Deposition, 14-15; Exhibit: Goodheim Deposition, 4). Petitioner testified, however, that he did not ask the First Assistant for help (R. II, 68) nor look for the First Assistant (R. II, 68) nor otherwise look around the engine rooms for any additional help nor ask such help from the engine storekeeper, who had authority to provide it (R. II, 69). It was the uncontradicted evidence of the First Assistant Engineer that it was his custom and practice to assign such help when requested (Exhibit: Pak Deposition, 32, 34).

The District Court found that Petitioner's injury was caused, to the extent of 50%, by his own negligence in failing to seek assistance (Finding 20, R. II, 67) and reduced his award by 50% accordingly (Finding 21, R. II, 67-68). The Court of Appeals examined and affirmed these findings.

Petitioner's statement that "no help or assistance was available to aid petitioner had he requested help in connection with the assigned task" is not supported by the record. Petitioner fails also to point out the correctness of the determination by both lower Courts that the Petitioner, an experienced and responsible officer, had failed to request any additional help in any event.

ARGUMENT

1. WHAT PETITIONER SEEKS IS A RE-EVALUATION OF FACTS, WHICH IS NOT THIS COURT'S FUNCTION

Petitioner's stated grounds for seeking certiorari are alleged conflicts between the decision here and the de-

cisions of other Courts. As we show below, the cases relied upon by Petitioner involve no conflicts at all. Throughout the argument runs the attempt to secure a re-evaluation of the evidence in this case, as it bears upon the District Court's finding of contributory negligence for failure of this experienced officer to seek additional help when help was claimed by him to have been needed.

Petitioner asserts that no help was available. By this he refers to evidence showing simply that no one was standing idle waiting to be called upon and that other men were engaged in various jobs to which they had been assigned. From this the Courts below were asked to believe that no other crewman could have been reassigned temporarily to assist Petitioner if his need for assistance had been brought to anyone's attention. The uncontradicted evidence was that it was the usual and customary practice of the First Assistant Engineer, the responsible officer, to assign such help when requested (Exhibit: Pak Deposition, 32, 34). No evidence going beyond such practice was required or proper, since the failure of Petitioner to make a request left any charge that the request would not have been complied with in the realm of mere inadmissible speculation.

The finding of negligence is a finding of fact. *Pacific Tow Boat Co. v. States Marine Corp.*, 276 F.2d 745, 752, 1960 A.M.C. 696, 705 (9th Cir. 1960.) The question was evaluated by the District Court against the background of all the evidence in this case. The finding was challenged, re-evaluated and upheld in the Court of Appeals. It is the settled doctrine of this Court, that, absent extraordinary circumstances, this Court will not review con-

current findings of fact of two lower Courts. *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 98-99, 1944 A.M.C. 1, 3 (1944), and cases there cited. No such extraordinary circumstances are presented here.

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2. NO QUESTION OF FEDERAL LAW IS PRESENTED WHICH HAS NOT BEEN SETTLED BY THIS COURT

Along with Petitioner's challenge to the lower Court's findings of fact there also appears, under the heading of alleged conflicts with the decisions of other courts of appeals, an argument for the adoption by this Court of a new rule not followed by any of these courts. Petitioner proposes, as though it were an unsettled matter in this Court, that this Court adopt a rule that the negligence of the seaman is without effect upon his claim so far as the claim is based upon unseaworthiness. The contention now urged was neither presented to nor decided by the Court below. Petitioner relies for this position upon certain non-maritime products liability cases.

Whether or not Petitioner reads the non-maritime, state-law products liability cases correctly, the law applicable to the present case has long been settled by this Court. In *Socony-Vacuum Oil Company v. Smith*, 305 U.S. 424, 1939 A.M.C. 1 (1939), this Court, dealing with a seaman's Jones Act negligence claim in which assumption of risk was urged as a defense, ruled that assumption of risk would not bar the claim but must be considered as negligence operating under the established Admiralty doctrine of comparative negligence to reduce the damages. The discussion of the Court there should

leave little doubt that the same rule of comparative negligence applied to the seaman's single cause of action when urged by him upon the alternative ground of unseaworthiness. Indeed, it is difficult to see how two different contributory negligence rules can be simultaneously applied to the same cause of action.[2]

In *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 1954 A.M.C. 1 (1953), this Court held that the maritime comparative negligence rule applied to a longshoreman's cause of action against the shipowner founded upon allegations of both negligence and unseaworthiness, citing *Socony Vacuum Oil Company v. Smith, supra.* In *Palermo v. Luckenbach Steamship Company, Inc.,* 355 U.S. 20, 1957 A.M.C. 2275 (1957), this Court again held, in a longshoreman's action for negligence and unseaworthiness, that the longshoreman's own negligence, if any, was to be considered in mitigation of damages, again citing the *Socony-Vacuum* case. In *United New York and New Jersey Sandy Hook Pilots Association v. Halecki,* 358 U.S. 613, 1959 A.M.C. 588 (1959), this Court agreed with the adoption, under State law, of the Admiralty rule of comparative negligence in a death claim founded upon unseaworthiness.

It can hardly be said, therefore, that the rule is unsettled. And it is difficult to imagine an argument for

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[2]Although the seaman's claim is founded upon the distinct grounds of negligence and unseaworthiness, it constitutes but a single cause of action. *Baltimore Steamship Company v. Phillips,* 274 U.S. 316, 1927 A.M.C. 946 (1927). Accordingly, *e.g.,* inconsistent doctrines of laches and limitations cannot be permitted to operate upon the two grounds since the whole cause of action would be affected by the more restrictive doctrine. *McAllister v. Magnolia Petroleum Co.,* 357 U.S. 221, 1958 A.M.C. 1754 (1958).

importing into the maritime law from State law a doctrine calculated to produce the utmost disorder by treating contributory negligence simultaneously in different ways in a seaman's single cause of action founded upon negligence and unseaworthiness.

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3. NO CONFLICT WITH THIS COURT OR ANOTHER COURT OF APPEALS IS PRESENTED

Petitioner urges the existence of a conflict with six other decisions of courts of appeals and one decision of this Court. The decision of this Court[3] and two of the courts of appeals' decisions[4] had nothing to do with the issue of contributory negligence. One of the courts of appeals decisions concerning maritime injuries involves inadequate jury instructions on the nature of the seaman's calling, as a background for the determination of contributory negligence[5] and one simply involves a finding of non-negligence in different circumstances than those presented here, rather than the application of any different rule of comparative negligence.[6] The remaining two cases[7] concern doctrines of State law rather than the maritime law involved in this case.

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[3] *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 1960 A.M.C. 2251 (1960).

[4] *Ballwanz v. Isthmian Lines, Inc.*, 319 F.2d 457, 1964 A.M.C. 1480 (4th Cir. 1963); *Sizemore v. United States Lines Co.*, 323 F.2d 774, 1964 A.M.C. 1950 (3rd Cir. 1963).

[5] *Cox v. Esso Shipping Company*, 247 F.2d 629, 1957 A.M.C. 1927 (5th Cir. 1957).

[6] *Smith v. United States*, 336 F.2d 165, 1965 A.M.C. 153 (4th Cir. 1964).

[7] *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3rd Cir. 1965); *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963).

Michalic v. Cleveland Tankers, Inc., 364 U.S. 325, 1960 A.M.C. 2251 (1960) did not concern the issue of the seaman's own negligence involved in the present case. The *Michalic* case concerned only the existence of a *prima facie* case of negligence and unseaworthiness entitling the seaman to have his claim presented to the jury, where the Court of Appeals had affirmed the District Court's grant of a directed verdict for the shipowner.

In *Cox v. Esso Shipping Company*, 247 F.2d 629, 1957 A.M.C. 1927 (5th Cir. 1957), the Court did not rule out contributory negligence of the seaman, but, on the contrary, affirmed that the jury, in evaluating the contributory negligence, was to determine "[w]hat a reasonably prudent seaman would or would not have done" (247 F.2d at 635, 1957 A.M.C. at 1937) and held that this question was submitted to the jury upon inadequate instructions as to the circumstances and nature of the unlicensed seaman's calling.

Ballwanz v. Isthmian Lines, Inc., 319 F.2d 457, 1964 A.M.C. 1480 (4th Cir. 1963), was a longshoreman's case in which the jury found 50% contributory negligence of the plaintiff and a defense judgment was entered upon the basis of confusing answers by the jury to special interrogatories. The finding of 50% contributory negligence was not in issue on appeal and was not criticized by the Appellate Court. The instruction concerning failure to request help which was disapproved by the Court of Appeals did not have to do with contributory negligence, as Petitioner urges, but was erroneous because it advised the jury that they might take plaintiff's

failure to complain into account in determining the basic question whether there was unseaworthiness.

Smith v. United States, 336 F.2d 165, 1965 A.M.C. 153 (4th Cir. 1964) was a case of injury to a non-supervisory longshoreman who was found contributorily negligent for climbing out of the hold in which he had been working all day by means of a ladder which had an observable defect in design and construction in that the toe clearance on certain rungs was less than that which is standard in the industry. Unseaworthiness based on the design and construction of the vessel was not in issue on the appeal, which challenged only the finding of contributory negligence. The Court of Appeals held the finding of contributory negligence improper in the circumstances since no alternative route was shown for the man to get out of the hold. The case turns on its peculiar facts, not the least of which is that the problem arose from the design and construction of a vessel, which a longshoreman would scarcely think it worthwhile to complain about or ask to have changed.

Sizemore v. United States Lines Co., 323 F.2d 774, 1964 A.M.C. 1950 (3rd Cir. 1963) does not concern contributory negligence in any way, as no contributory negligence was found by the jury and the appeal by the plaintiff longshoreman concerned only what he considered to be an inadequate judgment brought about by failure of the Court to give adequate instructions upon the issue of permanent injury and continuing disability. The Court of Appeals' Opinion took no note of the issues in the District Court which had not been brought before the Court on appeal.

Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3rd Cir. 1965) and *Green v. American Tobacco Co.*, 325 F.2d 673 (5th Cir. 1963), the remaining two cases which Petitioner urges to be in conflict, deal only with the non-maritime State laws of Pennsylvania and Florida, respectively, and obviously, therefore, do not involve any possible conflict with a decision under the Jones Act and general maritime law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Dated, San Francisco, California,
September 18, 1967.

Respectfully submitted,
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